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4 DEREKE G.,¹
5 Plaintiff,
6 v.
7 MARTIN J. O'MALLEY,
8 Defendant.

9 Case No. 23-cv-06726-RMI
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**ORDER RESOLVING SOCIAL
SECURITY APPEAL**

Re: Dkt. Nos. 14, 17

13 Plaintiff seeks judicial review of an administrative law judge ("ALJ") decision finding that
14 Plaintiff was not disabled under Title II of the Social Security Act. *See* Admin. Rec. at 1.² The
15 Appeals Council of the Social Security Administration declined to review the ALJ's decision. *Id.*
16 As such, the ALJ's decision is a "final decision" of the Commissioner of Social Security,
17 appropriately reviewable by this court. *See* 42 U.S.C. § 405(g), 1383(c)(3). Both parties have
18 consented to the jurisdiction of a magistrate judge (Dkts. 8, 10), and both parties have filed briefs
19 (Dkts. 14, 17). For the reasons stated below, the decision of the ALJ is REVERSED and the case
20 is REMANDED FOR FURTHER PROCEEDINGS consistent with this order.

21 **I. Background**

22 Plaintiff was 46 years old when he filed his application. AR at 53. He reports that he
23 "came from poverty" and "had a very rough childhood." *Id.* at 580, 612. He was frequently
24 bullied at school. *Id.* at 612. At age 12, he was sexually molested by a stranger in a park. *Id.* The

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26 ¹ Pursuant to the recommendation of the Committee on Court Administration and Case
Management of the Judicial Conference of the United States, Plaintiff's name is partially redacted.
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28 ² The Administrative Record ("AR"), which is independently paginated, has been filed in eight
attachments to Docket Entry #9. *See* Dkts. 9-1 through 9-8.

1 same year, he was visiting his grandmother when she called him into her room. When he arrived,
2 his grandmother had lapsed into a coma; she passed away shortly afterwards. Plaintiff's parents
3 divorced when he was in high school, and he began staying with friends and on the street because
4 he was unable to stay in the family home at the time. Later in life, he fell victim to abusive
5 relationships, reporting that former partners "maced him, hit him in the head with a pan in his
6 sleep, held him captive, and forced him to have sex." *Id.* In 2009, Plaintiff was shot in the groin
7 by people attempting to burglarize his home. *Id.* at 79, 613. Due to this injury, he cannot have
8 children. *Id.* at 575.

9 Plaintiff has a history of using and abusing cocaine, alcohol, and marijuana. AR at 576.
10 He reports being jailed four times for drug and alcohol use. *Id.* at 612. By 2018, Plaintiff had had
11 at least two more serious brushes with the law, including an assertedly wrongful conviction for
12 assault with a firearm.³ *Id.* While jailed for this offense, he witnessed a stabbing; while in prison
13 following his conviction, he witnessed sexual violence. Later, he became involved with the
14 federal justice system. *Id.* The earliest treatment notes in the record reflect that Plaintiff's parole
15 was a source of stress for him. *Id.* at 157, 486, 490, 517. In more recent years, Plaintiff has
16 admirably overcome many of these obstacles. He has not used alcohol or cocaine since 2015, and
17 he keeps a relapse prevention plan taped to his door to help him remain sober. *Id.* at 614. He
18 successfully completed his probation in 2020. *Id.* at 570.

19 Plaintiff has suffered from depression since he was a child, and he has also been diagnosed
20 with anxiety and post-traumatic stress disorder (PTSD). AR at 492, 496, 651. He consistently
21 reports symptoms such as depressed mood (*id.* at 139, 496, 645, 648, 657), poor sleep (*id.* at 134,
22 420, 490, 496, 648, 657), low energy (*id.* at 480, 484, 492, 490, 496, 644, 648, 657), poor
23 concentration (*id.* at 413, 424, 496, 649, 657), intrusive thoughts (*id.* at 134, 496, 649, 657),
24 hyperarousal (*id.* at 496, 644, 657), nightmares (*id.* at 486, 488, 490, 496, 648, 657), avoidance
25 (*id.* at 134, 139, 496, 580, 592, 644, 648–49, 657), vigilance (*id.* at 496, 575, 644, 649), worried
26 thoughts (*id.* at 414, 496, 575, 590, 644, 648, 657), difficulty relaxing (*id.* at 496, 644), lack of
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28 ³ Plaintiff claims that he has "never touched a gun" and that he was the one assaulted in the charged incident. AR at 612.

1 initiative (*id.* at 649, 656), and negative self-ideation (*id.* at 139, 496, 649, 657). In 2018, Plaintiff
2 began a medication regimen which “mild[ly]” improved his depression and anxiety in the
3 estimation of his treatment provider. *Compare id.* at 492 (“moderate to severe depression and
4 anxiety” in April 2018) *with id.* at 492 (“moderate depression and anxiety” in June 2018, a “[m]ild
5 improvement”). In 2022, another provider stated that Plaintiff’s “anxiety and sadness are severe
6 and interfere with day to day function inclu[ding] social.” *Id.* at 141. The same provider found
7 that Plaintiff was “moderate[ly]” impaired in his abilities to perform activities of daily living;
8 maintain social functioning and relationships; concentrate, persist, and maintain pace; and avoid
9 extended episodes of decompensation or increased symptoms. *Id.* at 656. This provider noted that
10 Plaintiff wanted to continue his medications despite the minimal benefit. *Id.* at 134.

11 In particular, Plaintiff reports that he is anxious about leaving his house. AR at 411
12 (Plaintiff reports that he “[o]nly goes out to attend” appointments), 414 (Plaintiff “is afraid of . . . a
13 crowd of people. Is afraid of getting shot again.”), 496 (“I stay inside, I keep to myself. With
14 everything I have gone through, I’m afraid to go outside.”), 580 (“he does not like being around
15 people and wants to stay on his own around the house”), 644 (Plaintiff “tries to stay aw[a]y from
16 the world . . . the apprehension is almost immediate on leaving” the house). Despite this, Plaintiff
17 is able to leave the house frequently to attend appointments, shop, visit friends and family, get
18 haircuts, and go to church. *Id.* at 423, 581, 654. Plaintiff also reports anxiety around authority
19 figures. *Id.* at 414; *but see id.* at 424 (Plaintiff’s sister reports that he has not had problems with
20 authority figures since being incarcerated).

21 Plaintiff alleges that his anxiety and depression make it difficult to concentrate. AR at 414
22 (claiming a 5-minute attention span and inability to finish what he starts), 424 (Plaintiff’s sister
23 reports he can pay attention for “Short Periods of Time” and needs instructions repeated several
24 times), 496 (“poor concentration”), 649 (“Sustained atten[t]ion is poor.”); *but see id.* at 135
25 (treatment provider notes “normal attention” during visit), 140 (same), 480 (provider notes no
26 attention or concentration problems during appointment), 482 (same), 488 (same). Relatedly, he
27 reports issues with his memory. *Id.* at 409 (function report claiming he requires verbal and written
28 reminders to take his medicine), 570 (Plaintiff “has been unable to check his A1C as he forgets to

1 go to the labs prior to visits"); *but see id.* at 497 (Plaintiff denies memory problems). Plaintiff's
2 lack of energy and initiative were noted by one treatment provider as obstacles to completing day-
3 to-day tasks. *Id.* at 656.

4 In addition to his mental conditions, Plaintiff suffers from several physical ailments. He
5 was diagnosed with diabetes and hypertension in 2018. AR at 538. However, it appears that he
6 has been able to manage these conditions through diet, exercise, and medication. *Id., id.* at 33
7 (treatment notes from shortly after ALJ's decision state that Plaintiff is feeling well, taking his
8 medication, and "[h]as started exercising two days per week, goes on 1 hours walks. Cut out
9 sugary drinks and fast food. Is cooking meals at home now."), 570 (noting blood sugar tests at
10 goal and regular gym attendance prior to COVID). Plaintiff supplements these efforts with daily
11 marijuana consumption, which "suppress[es] his appetite and thus lower[s] total food consumption
12 and blood sugar[.]" *Id.* at 158. Plaintiff has also stated that his groin injury causes ongoing pain
13 and nerve damage. *Id.* at 611. He reported that this nerve damage meant that he could only walk
14 a single block before needing a ten-minute rest. *Id.* at 413.⁴ Plaintiff also told one provider that he
15 had "been hit in [the] head with a metal bar and arm [dis]located with a metal bar[.]" *Id.* at 118.
16 He reported issues with his arm "shut[ting] down like nerve damage[.]" *Id.* at 649. One account
17 of Plaintiff's medical history mentions that Plaintiff was treated in an emergency room for being
18 "hit in the head and shot[,]" but the record before this court contains no documents from that
19 hospitalization. *Id.* at 650.

20 Plaintiff applied for Social Security benefits on February 6, 2020. AR at 153. His
21 application alleged impairments of PTSD, diabetes, head injury, and hand and nerve damage. *Id.*
22 While his application was pending, Plaintiff was seen by two consulting examiners: Aparna Dixit,
23 PsyD, and Farah Rana, M.D. *Id.* at 575, 580. Dr. Dixit conducted a psychological disability
24 evaluation, while Dr. Rana conducted an internal medicine evaluation. *Id.*

25 Dr. Dixit reported that Plaintiff was concerned about his safety due to the 2009 shooting.
26 AR at 575. Dr. Dixit also noted that Plaintiff "feels nervous and restless when he is among
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28 ⁴ After the ALJ rendered his decision in this case, Plaintiff was prescribed Gabapentin for this pain. AR at 23.

1 people. He isolates and feels sad and is triggered easily into an anxiety response.” *Id.* Dr. Dixit
2 stated that Plaintiff was able to take care of his grooming and hygiene needs and household chores
3 as well as to go grocery shopping and “make himself a simple microwave meal.” *Id.* at 576.
4 Plaintiff was noted to spend his leisure time “watch[ing] TV, keep[ing] to himself, socializ[ing]
5 with friends and family, and tak[ing] naps.” *Id.* Dr. Dixit observed Plaintiff to be adequately
6 clean and groomed, with an unremarkable gait and adequate eye contact. *Id.* Dr. Dixit described
7 Plaintiff as “cooperative and pleasant” despite a “dysthymic” mood. *Id.* Dr. Dixit also noted no
8 difficulties with attention during the evaluation. *Id.* at 578.

9 Dr. Dixit performed the WAIS-IV test for IQ, the WMS-IV test for memory, and the Trail
10 Making Test for neuropsychological function. AR at 575. Dr. Dixit assessed Plaintiff’s full-scale
11 IQ at 76, “within the borderline impaired range.” *Id.* at 577. The WAIS-IV also indicated that
12 Plaintiff’s working memory was in the borderline impaired range, while his verbal
13 comprehension, perceptual reasoning, and processing speed were in the low-average range. *Id.*
14 Plaintiff’s WMS-IV scores were in the low average range, “suggest[ing] mildly compromised
15 auditory and visual working memory functioning.” Plaintiff’s Trail Making Test scores
16 “suggested mild impairment in the domain of sequencing, organizing, and mental flexibility and
17 executive functioning.” *Id.* Dr. Dixit concluded that “[n]o significant cognitive deficits were
18 evident[,]” although “[p]sychiatric symptoms commensurate with anxiety were noted[.]” *Id.* at
19 578. Dr. Dixit opined that Plaintiff would have no difficulty remembering or following
20 instructions, working with supervisors or coworkers, or maintaining pace and persistence over
21 two-hour increments. *Id.* Dr. Dixit opined that Plaintiff was mildly impaired in working with the
22 public and performing tasks that require mental flexibility. *Id.*

23 Dr. Rana noted that Plaintiff “checks his blood sugars very frequently” and “denies any
24 complications of diabetes.” AR at 580. Plaintiff also told Dr. Rana that he had been taking his
25 hypertension medication since his diagnosis. *Id.* He complained of “pain and numbness in his left
26 hand” which “bothers him mostly early in the morning and when the weather is cold.” He also
27 mentioned his mental health conditions. He told Dr. Rana that “he manages to do most of his
28 chores. He washes dishes, makes up his bed, cleans bathroom, and tidies up after himself. He

1 goes to the store frequently to get himself food and other things.” *Id.* at 580–81. Dr. Rana’s
2 physical examination was largely normal except for a positive Tinel’s sign⁵ in Plaintiff’s left
3 hand. *Id.* at 581. Despite the Tinel’s sign, Plaintiff’s left hand had a normal grip and no sensory
4 deficits. *Id.* Dr. Rana observed Plaintiff to have a “stable” gait and no limp. *Id.* Plaintiff’s
5 strength was assessed as “5/5 throughout.” *Id.* at 582. Dr. Rana concluded that Plaintiff “does not
6 have any sitting, standing, or walking limitations. He does not have any weight-carrying
7 limitations. He can handle, manipulate, feel, and finger objects without any problem. . . . He does
8 not have any postural limitations.” *Id.*

9 Based on this medical evidence, the state agency which initially assessed Plaintiff’s Social
10 Security application determined that Plaintiff would be moderately limited in his ability to
11 concentrate, persist, and maintain pace as well as his ability to complete a normal workday or
12 workweek without experiencing psychological symptoms. AR at 175, 180, 182. Plaintiff’s
13 physical impairments were found to be non-severe. *Id.* at 161. Plaintiff appealed this
14 determination to the Social Security Administration.

15 In preparation for the appeal, Plaintiff arranged to be examined by Dr. Katherine Wiebe.
16 AR at 609. Dr. Wiebe described plaintiff as “cooperative and responsive[,]” but noted a
17 “depressed” mood and “restricted” affect. *Id.* at 615. Plaintiff “cried when recalling painful past
18 experiences” and “evinced avoidance and dysphoria when reminded of trauma history.” *Id.*
19 Despite “good” effort on testing, Dr. Wiebe noted that Plaintiff was “easily confused[,]” “had
20 trouble with focus and required frequent repetition of directions[,]” and “evinced problem[s] with
21 memory, including immediate and remote memory for his personal history.” *Id.* At several points
22 during the assessment, Dr. Wiebe noted that Plaintiff lost his train of thought and turned to
23 unrelated topics. *Id.* at 618 (“He reported that his weight ‘fluctuates all the time . . . diabetes now .
24 . . thing with my brother, sitting by the phone . . .’”), 619 (“When asked whether he feels restless,
25 he said he does, adding (incongruously): ‘. . . I don’t like violence and I don’t like arguing—that

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27 ⁵ A tingling sensation when an affected nerve is tapped. *Tinel’s Sign*, CLEVELAND CLINIC (April
28 1, 2022), <https://my.clevelandclinic.org/health/diagnostics/22662-tinels-sign>. It indicates potential
damage to, or compression of, the affected nerve. *Id.*

1 what I was getting from my women in my life.””).

2 Dr. Wiebe performed a battery of psychological tests as well as a clinical interview. AR at
3 615–16. She determined that Plaintiff had a moderate cognitive impairment, including moderate
4 impairment in attention and concentration and a severe memory impairment. *Id.* at 616. Indeed,
5 on one immediate memory test, Plaintiff scored in the 0.2nd percentile. *Id.* Dr. Wiebe also found a
6 moderate impairment in Plaintiff’s language comprehension and moderate to severe impairment in
7 Plaintiff’s executive functioning. *Id.* at 616–17. She determined that Plaintiff suffered from
8 severe depression and moderate anxiety. *Id.* at 617. She noted that Plaintiff was moderately to
9 extremely affected by many symptoms of PTSD. *Id.* at 617–18. Plaintiff’s responses in the
10 clinical interview “suggest[ed] feelings of extreme vulnerability associated with a current episode
11 of acute turmoil.” *Id.* at 619. Dr. Wiebe concluded that “[o]n the basis of the test data, it may be
12 assumed that he is experiencing a severe mental disorder.” *Id.* Specifically, Dr. Wiebe diagnosed
13 Plaintiff with “Major depressive disorder, Recurrent episode, Severe” as well as generalized
14 anxiety disorder, PTSD, an “[u]nspecified neurocognitive disorder,” an “[u]nspecified personality
15 disorder” with “Schizoid Personality Traits, Avoidant Personality Traits, Melancholic Personality
16 Features, and Paranoid Personality Features[,]” and a prior history of “[c]ocaine use disorder[.]”
17 *Id.* at 625.

18 In a form appended to her opinion, Dr. Wiebe indicated that Plaintiff was markedly
19 impaired in his abilities to understand, remember, and carry out detailed instructions; maintain
20 attention and concentration for two-hour segments; and complete a normal workday or workweek
21 without interruption from psychologically-based symptoms. AR at 629. Dr. Wiebe assessed
22 moderate-to-marked impairments in getting along with others without excessive irritability,
23 sensitivity, argumentativeness, or suspiciousness; interacting appropriately with the general
24 public; accepting instructions and responding appropriately to criticism from supervisors; and
25 responding appropriately to changes in a routine work setting and dealing with normal work
26 stressors. *Id.* She assessed moderate impairments in understanding, remembering, and carrying
27 out very short and simple instructions; performing at a consistent pace without an unreasonable
28 number and length of rest periods; and maintaining regular attendance and acceptable punctuality.

1 *Id.*

2 Plaintiff's hearing before the ALJ took place on November 10, 2022. The ALJ called a
3 medical expert as a witness to opine on Plaintiff's psychological impairments. AR at 65. The
4 medical expert was skeptical of Dr. Wiebe's diagnosis of a neurocognitive disorder, stating that
5 such a diagnosis would not be valid until Plaintiff had a "sustained period of remission" from
6 marijuana use. *Id.* at 67. Indeed, the expert said that "many of the diagnoses [were] in doubt or
7 not as reliable as they would normally be without a full sustained period of remission of the
8 cannabis use." *Id.* at 73. He stated that Plaintiff's abysmal performance on Dr. Wiebe's memory
9 assessment was an outlier result which may have been caused by substance use earlier that day.
10 *Id.* at 69. However, he conceded that some of Plaintiff's moderate limitations "would be the case
11 with or without cannabis use." *Id.* at 74. Ultimately, based on his review of the record, he
12 assessed Plaintiff with a moderate limitation in understanding, remembering, and applying
13 information; a mild to moderate limitation in interacting with others; a mild to moderate limitation
14 in concentrating, persisting, and maintaining pace; and a mild limitation in adapting and managing
15 himself. *Id.* at 69.

16 Plaintiff testified about his physical and psychological symptoms. Regarding his physical
17 symptoms, he stated that he had worked on a vehicle assembly line but left the job after two
18 months because he was unable to keep up with the pace of work. AR at 79. He attributed this to
19 "pain from standing" due to his gunshot wound. *Id., id.* at 82. He described both standing and
20 walking as painful. *Id.* at 83–84. He said that sitting was less painful, but that he had to sit in an
21 awkward position which would eventually cause him to cramp up. *Id.* He stated that he had to
22 wear thermal underwear in the cold because the cold worsened the pain, stretch his legs out in
23 front of him to make the pain manageable, and walk carefully to avoid any pain. *Id.* at 85–86.
24 Even with careful walking, he said he needed 30 to 45 minutes of rest after every ten minutes of
25 walking before he could continue. *Id.* at 87–88. Likewise, he reported having to massage his leg
26 for ten minutes after every 15 minutes of sitting. *Id.* at 90. He also described an unhealed elbow
27 fracture which prevented him from extending his right arm. *Id.* at 80–81.

28 Plaintiff also reported suffering from debilitating headaches twice per week. AR at 91. He

1 stated that he “can’t function” when these headaches occur and that the resulting pain is a 10 out
2 of 10. *Id.* at 93. In order to stop these headaches, he reported needing to retreat to a lightless
3 environment and take a sleeping pill. *Id.* at 91–92. He explained that after he woke up, the
4 headache would be reduced to a 2 or 3 out of 10 and could be treated with over-the-counter pain
5 relievers. *Id.* at 92.

6 Plaintiff discussed his marijuana use, stating that it helps his appetite. AR at 93. He
7 explained that when forced to abstain from marijuana during outpatient treatment, his diet was
8 unhealthy. *Id.* at 94. He also noted that anxious thoughts would keep him awake when he did not
9 take marijuana, stating: “it makes me think a lot more when I don’t have the marijuana.” *Id.* at 95.
10 Plaintiff stated that his anxiety and depression were both worse when he was not taking marijuana.
11 *Id.* at 96.

12 Plaintiff described his PTSD as an obstacle to his employment. AR at 80. He stated that
13 his anxiety distracted him from doing chores. *Id.* at 96–97. He noted that he would get distracted
14 after 20 to 30 minutes while washing dishes unless he was listening to music. *Id.* at 97–98. He
15 also alleged that he had to switch tasks every 20 to 30 minutes. *Id.* at 98. He noted that he was
16 often distracted by his thoughts and lost track of time as a result, and that this happened 50 to 60
17 percent of the time during his daily routine. *Id.* at 103–04.

18 He described his anxiety around going outside as follows:

19 “if I’m outside or around a lot of people, I get a lot of anxiety and I
20 go back into depression because it makes me feel like I’m under a lot
21 of pressure because I’m around a lot of people and I feel like I’m
22 under, like under surveillance or under attack because when I was
shot, that was a horrible experience. And then, it just brought up to
when I was little when I was sexually molested. So all that just
triggers on down to every little bitty thing.”

23 AR at 99.

24 Plaintiff stated that if he received criticism from a work supervisor, “I would completely
25 shut down and go into like quiet mode because I’m very private.” AR at 100. Somewhat
26 incongruously, he continued: “So that right there, my feelings, I’ve been tortured like just
27 dealing—when I was in relationships with women, when I was living from here to there, the
28 women would call me gay or say bad things about me[.]” *Id.* When prompted, he elaborated that

1 “quiet mode” entailed “just being quiet, mouth closed, head down, wanting to leave, wanting to
2 get a piece [sic] of mind and deal with myself.” *Id.* at 101. On further prompting by the ALJ,
3 Plaintiff stated that he would feel the need to leave the area and would have a hard time returning
4 to the job. *Id.*

5 In a similar vein, Plaintiff testified that he rescheduled and postponed appointments when
6 he didn’t feel like leaving the house. AR at 101. He attributed this to “[t]he fear of just going
7 outside and going to deal with regular things of dealing with the doctors and the dentists and
8 things like that. . . . and dealing with court issues, any type of thing that rattle my cage.” *Id.* at
9 102. Plaintiff testified that he cancelled more than half of his appointments. *Id.*

10 A vocational expert testified that a person who was off task more than 15% of the time
11 would not be employable, nor would an unskilled worker who needed to switch tasks
12 autonomously throughout the workday. AR at 109, 111. The vocational expert noted that walking
13 off the job in response to criticism, especially more than once, would preclude employment. *Id.* at
14 112.

15 The ALJ ultimately concluded that Plaintiff was not disabled. AR at 1. The ALJ
16 conducted the required five-step analysis, finding at Step 1 that Plaintiff had not engaged in
17 substantial gainful activity since the application date. *Id.* at 46. At Step 2, the ALJ found that
18 Plaintiff had the severe impairments of depressive disorder, anxiety disorder, PTSD, cannabis use
19 disorder, and polysubstance use disorder in remission. *Id.* The ALJ stated that the personality and
20 neurocognitive disorders diagnosed by Dr. Wiebe were not “medically determinable
21 impairments[,]” as none of Plaintiff’s other providers had diagnosed or suspected such disorders,
22 and based on the medical expert’s testimony that a diagnosis of neurocognitive disorder could not
23 be reliably made until Plaintiff “had a sustained remission from marijuana use.” *Id.* The ALJ
24 further found that Plaintiff’s diabetes and hypertension were non-severe because they were not
25 symptomatic. *Id.* at 46–47. The ALJ dismissed Plaintiff’s reports of hand and nerve damage,
26 noting Plaintiff’s generally normal physical examination and Plaintiff’s regular weightlifting. *Id.*
27 at 47. Similarly, the ALJ found Plaintiff’s gunshot injury non-severe because the record did not
28 reflect residual symptoms or resulting functional limitations. *Id.* Finally, the ALJ found that

1 Plaintiff's head injury was not a determinable impairment because "the treatment record does not
2 show any head injuries or residual symptoms of a head injury[.]" *Id.*

3 At Step 3, the ALJ determined that Plaintiff's impairments did not meet or equal a listed
4 impairment. AR at 48. The ALJ considered whether Plaintiff had one "extreme" or two "marked"
5 limitations across the four "Paragraph B" criteria. *Id.* As to the first criterion; understanding,
6 remembering, or applying information; the ALJ determined Plaintiff had a moderate limitation.
7 The ALJ reached this conclusion by noting Plaintiff's onetime denial of memory problems and
8 many normal mental status examination findings relating to memory alongside Dr. Dixit's finding
9 that Plaintiff had a borderline IQ and low-average memory. As to the second criterion, interacting
10 with others, the ALJ found a moderate limitation based on Plaintiff's reported fear of authority
11 figures and crowds, his anxious mood at medical visits, and the fact that medical providers noted
12 no difficulties working with Plaintiff. For the third criterion; concentrating, persisting, and
13 maintaining pace; the ALJ found a moderate limitation based on Plaintiff's self-reported attention
14 difficulties, the treatment notes showing no problems with attention or concentration, and the fact
15 that Plaintiff "displayed no obvious problems with attention or concentration at the hearing. He
16 appeared to follow the proceedings and provided appropriate responses to questions." And for the
17 fourth criterion, adapting or managing oneself, the ALJ assessed a mild limitation based on
18 Plaintiff's evident emotional regulation during medical visits, ability to seek out appropriate
19 medical care and attend his appointments, and ability to perform personal care and household
20 tasks. *Id.*

21 At Step 4, the ALJ determined that Plaintiff had the residual functional capacity to perform
22 "a full range of work at all exertional levels" but was limited to simple, routine tasks and to
23 occasional interaction with supervisors, coworkers, and the public. AR at 49. The ALJ found that
24 Plaintiff's "determinable impairments could reasonably be expected to cause the alleged
25 symptoms" but that Plaintiff's "statements concerning the intensity, persistence and limiting
26 effects of these symptoms are not entirely consistent with the medical evidence and other evidence
27 in the record for the reasons explained in this decision." *Id.* at 50. The ALJ found these
28 statements "persuasive . . . only to the extent consistent with the residual functional capacity." *Id.*

1 at 52. The ALJ found the opinions of Dr. Dixit and the state agency's medical consultants
2 partially persuasive, noting that later treatment records "suggest[] some worsening of symptoms
3 relating to [Plaintiff's] depressive and anxiety disorders" since those opinions were issued. *Id.* at
4 51. The ALJ found the medical expert's opinion mostly persuasive but rejected the expert's
5 suggestion that Plaintiff should not do fast-paced work. *Id.* at 52. By contrast, the ALJ found Dr.
6 Wiebe's opinion unpersuasive. *Id.* at 52. The ALJ stated that Dr. Wiebe's opinion was
7 inconsistent with the "benign mental status findings" and "improvement with medication"
8 reflected in Plaintiff's treatment records, noting that Plaintiff's current mental health provider
9 "believed that the claimant's impairments caused only moderate limitation even before treatment
10 commenced." *Id.* The ALJ also found Dr. Wiebe's conclusions inconsistent with Plaintiff's
11 behavior at the hearing, where Plaintiff was "clear and coherent" and "displayed no obvious
12 problems following the proceedings, responding to questioning, or recalling historical
13 information." *Id.*

14 Ultimately, based on the vocational expert's testimony, the ALJ concluded that Plaintiff
15 could work as a dishwasher, laboratory equipment cleaner, or machine package sealer. AR at 54.
16 Accordingly, the ALJ determined that Plaintiff was not disabled. *Id.*

17 Plaintiff appeals.

18 **II. Standard**

19 The Social Security Act limits judicial review of the Commissioner's decisions to final
20 decisions made after a hearing. 42 U.S.C. § 405(g). The Commissioner's findings "as to any fact,
21 if supported by substantial evidence, shall be conclusive." *Id.* A district court has limited scope
22 of review and can only set aside a denial of benefits if it is not supported by substantial evidence
23 or if it is based on legal error. *Flaten v. Sec'y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th
24 Cir. 1995). The phrase "substantial evidence" appears throughout administrative law and directs
25 courts in their review of factual findings at the agency level. *See Biestek v. Berryhill*, 139 S. Ct.
26 1148, 1154 (2019). Substantial evidence is defined as "such relevant evidence as a reasonable
27 mind might accept as adequate to support a conclusion." *Id.* at 1154 (quoting *Consol. Edison Co.*
28 v. *NLRB*, 305 U.S. 197, 229 (1938)); *see also Sandgathe v. Chater*, 108 F.3d 978, 979 (9th Cir.

1 1997). “In determining whether the Commissioner’s findings are supported by substantial
2 evidence,” a district court must review the administrative record as a whole, considering “both the
3 evidence that supports and the evidence that detracts from the Commissioner’s conclusion.”
4 *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). The Commissioner’s conclusion is upheld
5 where evidence is susceptible to more than one rational interpretation. *Burch v. Barnhart*, 400
6 F.3d 676, 679 (9th Cir. 2005). However, courts “review only the reasons provided by the ALJ in
7 the disability determination and may not affirm the ALJ on a ground upon which he did not rely.”
8 *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014).

9 **III. Analysis**

10 The court concludes that the ALJ failed to analyze Plaintiff’s testimony in sufficient detail
11 to allow for adequate review. “A finding that a claimant’s testimony is not credible must be
12 sufficiently specific to allow a reviewing court to conclude the adjudicator rejected the claimant’s
13 testimony on permissible grounds and did not arbitrarily discredit a claimant’s testimony
14 regarding” subjective symptoms. *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015).
15 “The ALJ must specify what testimony is not credible and identify the evidence that undermines
16 the claimant’s complaints—general findings are insufficient.” *Burch*, 400 F.3d at 680 (internal
17 quotations and alterations omitted).

18 To be sure, the ALJ made the necessary showing to discredit some parts of Plaintiff’s
19 testimony. For example, the ALJ properly discounted Plaintiff’s physical symptom testimony:
20 “Reports of significantly diminished walking capacity and inability to extend the right arm are
21 inconsistent [with] the physical examinations throughout the record, which show no clinical
22 abnormalities in the extremities, as well as the claimant’s demonstrated ability to lift weights, use
23 a Stairmaster, and use a treadmill on a regular basis.” AR at 52–53.⁶ For other alleged symptoms,
24 however, the court has been left to guess which testimony is being disregarded and why. Most
25 notably, Plaintiff testified that he would likely respond to criticism from a supervisor by leaving
26 the premises, and the vocational expert testified that this would preclude competitive work. The
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⁶ Plaintiff does not allege any errors relating to the ALJ’s discrediting of his physical symptoms.

1 ALJ implicitly discredited this testimony by finding that Plaintiff was employable, but the ALJ's
2 opinion contains no explanation as to why this specific testimony was discredited. Additionally,
3 Plaintiff testified that he suffers debilitating headaches twice per week that require him to retreat
4 to a lightless environment and take a sleeping pill. While this would certainly seem to bear on
5 Plaintiff's employability, the closest the ALJ's opinion comes to addressing this testimony is
6 noting at Step 2 that "the treatment record does not show any head injuries or residual symptoms
7 of a head injury[.]" *Id.* at 47. To the extent this is meant to discredit Plaintiff's headache
8 testimony, it is both insufficiently specific (as recurring headaches might be caused by conditions
9 other than a head injury) and contradicted by the ALJ's later statement that Plaintiff's "medically
10 determinable impairments can reasonably be expected to cause the alleged symptoms[.]" *Id.* at 50.

11 The ALJ's failure to specifically analyze Plaintiff's allegations has affected multiple steps
12 of the analysis. At Step 2, for instance, Plaintiff's testimony about his cognitive and emotional
13 symptoms could bolster Dr. Wiebe's diagnoses of personality and neurocognitive disorders,
14 leading to a determination that these were serious impairments. At Step 3, Plaintiff's testimony
15 about his symptoms bears on the listing analysis: for example, Plaintiff claims that he cancels
16 most of his appointments due to anxiety, but the ALJ determined that Plaintiff was minimally
17 limited in adapting and managing himself because (among other things) he could attend medical
18 appointments. Further, Plaintiff's testimony corroborates his self-reports in the treatment notes,
19 content which the ALJ generally disregarded. And at Step 5, as previously mentioned, one of
20 Plaintiff's alleged symptoms would preclude employment based on the evidence in the record.
21 Accordingly, the court cannot say that the failure to properly analyze Plaintiff's testimony was
22 harmless error. Remand is therefore required.

23 **IV. Form of Remand**

24 Plaintiff requests that his case be remanded for an award of benefits instead of for further
25 proceedings. After careful review of the record, however, the court has determined that further
26 proceedings are appropriate in this matter. Remand for further proceedings is appropriate when
27 "an evaluation of the record as a whole creates serious doubt that a claimant is, in fact, disabled."
28 *Garrison*, 759 F.3d at 1021. In the past, the Ninth Circuit has allowed for remand where, although

1 an ALJ failed to make the necessary findings to discredit a plaintiff's testimony, the record cast
2 doubt on the plaintiff's credibility. *See, e.g., Burrell v. Colvin*, 775 F.3d 1133, 1141 (9th Cir.
3 2014), *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003).

4 Here, the record contains potential contradictions which may indicate that Plaintiff
5 exaggerated some of his symptoms. *Compare* AR at 409 (Plaintiff's function report states he
6 "[p]repare[s] simple meals or does frozen dinners. Or does not eat" despite being able to cook
7 more complex meals before his disability) with *id.* at 421 (third-party function report states
8 Plaintiff cooks daily for up to an hour, prepares dishes like steak and pasta, and has not changed
9 his cooking habits since becoming disabled); *id.* at 82 (Plaintiff testified that he was let go from an
10 assembly-line job because he moved too slowly on account of his significant pain) with *id.* at 613
11 (Plaintiff told a doctor that he was actually dismissed from that position in retaliation for joining a
12 lawsuit); *id.* at 411 (Plaintiff's function report states he only leaves the house to attend
13 appointments and his family shops for him) with *id.* at 422 (third-party function report states
14 Plaintiff leaves the house daily, shops once per month, and likes to visit two different stores when
15 shopping), 23 (three years after the function reports were issued, treatment notes indicate Plaintiff
16 "[l]ikes to shop daily" and dines out several times per week); *id.* at 102 (Plaintiff testified that he
17 cancels over half of his appointments due to anxiety) with *id.* at 14–543 (medical records from
18 Plaintiff's primary care provider indicate only two cancelled appointments out of 13 appointments
19 total, roughly half of which were in-person).

20 These apparent contradictions do not necessarily mean that Plaintiff is not credible, and in
21 context some may prove not to be contradictory at all. Nevertheless, "[b]ecause there are
22 insufficient findings as to whether [Plaintiff's] testimony should be credited as true, [the court
23 will] remand for further determinations." *Connett*, 340 F.3d at 876.

24 **V. Instructions on Remand**

25 While the ALJ's failure to make sufficiently specific credibility findings is sufficient to
26 require remand, Plaintiff has raised other issues with the ALJ's decision which the court addresses
27 below.

28 *a. Step 2 Error – Wiebe Diagnoses*

1 Plaintiff argues that the ALJ improperly discounted his diagnoses of personality and
2 neurocognitive disorders based on the medical expert's testimony. The medical expert testified
3 that it was not possible to reliably diagnose personality or neurocognitive disorders without a
4 sustained period of remission from marijuana use. As Plaintiff points out, Social Security Ruling
5 (SSR) 13-2p prescribes a process whereby the ALJ first determines whether a claimant is disabled,
6 then accounts for the effect of drug addiction and alcoholism ("DAA") on Plaintiff's symptoms.
7 The Social Security Administration has stated that "[a] claimant has DAA when he or she has a
8 medically determinable substance use disorder(s)[.]" SSA POMS DI 90070.050 (2021). As
9 Plaintiff sees it, the ALJ should have analyzed Plaintiff's personality and neurocognitive disorders
10 when determining whether Plaintiff was disabled, and then considered whether those disorders
11 were caused or exacerbated by Plaintiff's marijuana use.

12 Defendant argues that SSR 13-2p does not apply to Plaintiff because "the ALJ did not find
13 Plaintiff had a medically determinable impairment of DAA and that Plaintiff was disabled[.]"
14 (Dkt. 17, p. 3). However, Defendant is wrong on the first count: the ALJ listed "cannabis use
15 disorder" as among Plaintiff's "severe impairments," then described the listed impairments as
16 "medically determinable" in the next paragraph. AR at 46. On remand, the ALJ should reevaluate
17 Plaintiff's asserted neurocognitive and personality disorders as they are reflected in the record,
18 then account for the effect of Plaintiff's cannabis use disorder on the severity or existence of these
19 disorders if Plaintiff is determined to be disabled.

20 ***b. Use of ALJ's Observations***

21 Plaintiff also takes issue with the fact that the ALJ relied in part on his observations of
22 Plaintiff at the hearing to determine that Plaintiff could pay attention for long periods of time.
23 However, an ALJ may properly take into account his observations of the plaintiff when
24 determining credibility as long as those observations do "not form the sole basis for discrediting a
25 person's testimony." *Orn v. Astrue*, 495 F.3d 625, 640 (9th Cir. 2007); see *Morgan v. Comm. of*
26 *Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999) ("The inclusion of the ALJ's personal
27 observations does not render the decision improper.") (internal citations and quotations omitted).

28 For the foregoing reasons, this matter is remanded for further proceedings consistent with

1 this order.

2 **IT IS SO ORDERED.**

3 Dated: March 17, 2025



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5 ROBERT M. ILLMAN
6 United States Magistrate Judge
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